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No. 80-1322

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MARIA EMILIA FAMILIA DE BOOM, ET AL.,
Petitioners,

versus

AROSA MERCANTIL, S.A., ET AL.,
Respondents.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

BRIEF IN REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

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ARGUMENT

I. Course Of Proceedings And Disposition Below

Respondents' opposition brief (p. 4) states that the district court did not act on defendants' Rule 12(b) motions to dismiss, omitting the following crucial information:

(1) The trial judge determined that these motions could not be decided until plaintiffs had the opportunity for adequate discovery of jurisdictional facts, and issued appropriate discovery orders.

(2) Before ordering jurisdiction discovery, the trial court satisfied itself that there was a reasonable basis for exploring plaintiffs' contention that permanent resident citizens and/or citizens of the United States were the equitable owners of defendant corporations and of the vessel.[1]

(3) Defendants' repeated violations of the court's discovery orders were, in the Fifth Circuit's view, "flagrant" and "contumacious."[2]

(4) The initial default against Arosa was "interlocutory," giving defendant the opportunity to cure it by coming forward with the requested information.[3]

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1 First Supp. Record, Vol. II, Tr. of Hearing of September 14, 1977, pp. 10-11; First Supp. Record, Vol. I, Tr. of Hearing of May 9, 1978, pp. 16-18.

2 Petition for Certiorari, p. 5a n.4, p. 10a, 629 F.2d at 1137 n. 4, 1139.

3 Petition for Certiorari, pp. 93a-94a.

Neither defendant ever purported to comply or to offer any justification for noncompliance.[4]

II. Statement Of Facts

Respondents significantly distort the present record when they claim that there was "no indication or no evidence to support personal jurisdiction" and that "every indication in the record was contrary to jurisdiction."[5] On the contrary, there *were* some record indications supportive of personal jurisdiction,[6] and the Fifth Circuit Court of Appeals determined only that the record failed to show sufficient contacts of defendants with Texas.[7]

III. The Decision Below Conflicts With Decisions Of Other Courts Of Appeals As Well As With Other Decisions Of The Fifth Circuit.

Respondents' purported distinction of *Lekkas v. Liberian M/V Caledonia*, 443 F.2d 10 (4th Cir. 1971), is disingenuous.[8] When a putatively foreign shipowner is sued

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4 Petition for Certiorari, pp. 94a, 97a-98a.

5 Opposition brief, pp. 7, 8.

6 See Petition for Certiorari, pp. 4-6.

7 Petition for Certiorari, pp. 9a-10a, 629 F.2d at 1138-39.

8 It is completely misleading to characterize *Lekkas* as a forum non conveniens case, see opposition brief p. 7. Defendant attacked the competency of U.S. courts and U.S. law under the Lauritzen v. Larsen line of decisions. See text and notes 15-18, *infra*. Nor is it apposite to state that "in *Lekkas* personal jurisdiction was clearly established." Opposition brief p. 8. The fact that defendant had an American agent was not of moment to the Court's reasoning. What *was* crucial was that, "[w]hen the [defendant] asked the court

in a United States court under the Jones Act and/or United States general maritime law, defendant may cast its challenge to the adjudication in the form of an argument based on personal jurisdiction,[9] subject matter jurisdiction,[10] the failure of the complaint to state a cause of action,[11] and/or a motion to decline jurisdiction.[12] Whatever the form of the challenge, the underlying issues are the same: defendant claims that United States courts and United States law cannot decide the matter because defendant and the cause-of-action-generating occurrence are foreign. To keep the case in the United States court, plaintiff must establish significant United States contacts under the factors laid down by this Court in *Hellenic Lines Limited v. Rhoditis*, 398 U.S. 306 (1970), and *Lauritzen v. Larsen*, 345 U.S. 571 (1953). Under those cases, a crucial fact is whether the ship is beneficially owned by American interests. That is what plaintiffs in the present case and in *Lekkas* were

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to decline jurisdiction, it subjected itself . . . to the obligation of furnishing . . . all pertinent information for decision of its motion." 443 F.2d at 11.

9 See Davis v. Asano Bussan Co., 212 F.2d 558 (5th Cir. 1954), holding the trial court erred in dismissing before defendants were required to respond to jurisdiction discovery.

10 See Hellenic Lines Limited v. Rhoditis, 412 F.2d 919, 921 (5th Cir. 1969), *aff'd*, 398 U.S. 306 (1970).

11 Lauritzen v. Larsen, 345 U.S. 571, 575 (1953); Romero v. International Terminal Operating Co., 358 U.S. 354, 359 (1959).

12 In *Lekkas*, defendant moved the court to decline jurisdiction. In Blanco v. Carigulf Lines, 632 F.2d 656, 657 (5th Cir. 1980), defendant filed an alternate motion to decline jurisdiction or to dismiss for want of jurisdiction. Both cases stress plaintiffs' entitlement to discovery to meet the jurisdictional challenge.

trying to find out, and it is clear beyond cavil that plaintiff is entitled to such discovery to meet the defendant's challenge to jurisdiction,[13] as the Court of Appeals in the present case acknowledged.[14] *Lekkas* holds that "[i]f the defendants do not promptly and forthrightly disclose the facts necessary for decision of this issue, the district court should apply sanctions under Fed.R.Civ.P. 37, and for the purposes of this case, take as established that the ship is owned by American interests; or, if justice requires, *the court should enter a default judgment* on the issue of liability." (443 F.2d at 11, emphasis added.)

Lekkas is squarely at odds with the decision below, as the Fifth Circuit Court of Appeals itself acknowledged.[15]

* * *

Blanco v. Carigulf Lines, 632 F.2d 656 (5th Cir. 1980), decided since the present case, is inconsistent in principle with the decision below. Plaintiff sued a Belize shipowner under the Jones Act and general maritime law, and defendant filed an alternate motion to decline jurisdiction and/or dismiss for want of jurisdiction, accompanying that motion with the standard affidavit as was done in the present case. Holding that the trial court erred in dismissing for lack of jurisdiction before plaintiffs had the opportunity for full jurisdiction dis-

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13 See cases cited in Petition for Certiorari, p. 8 n. 7.

14 Petition for Certiorari p. 6a, 629 F.2d at 1137.

15 Petition for Certiorari pp. 10a-11a, 629 F.2d at 1139.

covery, the Fifth Circuit emphasized plaintiffs' right to jurisdiction discovery[16] and stated:

> [T]he district court dismissal for lack of jurisdiction was error. Plaintiff is not required to rely exclusively upon a defendant's affidavit for resolution of the jurisdictional issue where that defendant has failed to answer plaintiff's interrogatories specifically directed to that issue. *To hold otherwise would permit an advantage to a defendant who fails to comply with the rules of discovery.* 632 F.2d at 658; emphasis added.

The decision in the present case is inconsistent with *Blanco*, because, in denying to the district court the power to enforce discovery, the Fifth Circuit has emptied plaintiff's discovery right of meaningful content *and* has offered great advantage to defendants who refuse to comply with discovery. The observation in the opinion below that "[t]his [holding] leaves the district judge in a quandary in trying to enforce his discovery order"[17] drastically understates the matter.

Nor does it answer the situation to suggest, as does respondent's opposition brief,[18] that the present decision does not necessarily deny the district court power to enforce discovery orders but is somehow confined to

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16 632 F.2d at 657, citing Davis v. Asano Bussan Co., 212 F.2d 558 (5th Cir. 1954), in which the sole issue was plaintiff's discovery rights in the face of a challenge to personal jurisdiction.

17 Petition for Certiorari, p. 11a, 629 F.2d at 1139.

18 Opposition brief, p. 9.

these particular facts[19] and to the default sanction, as opposed to other facts and other discovery sanctions. The decision below clearly reaches all the F.R.C.P. 37(b) sanctions; if the district court cannot default defendants without first establishing personal jurisdiction, it surely cannot cure the "sovereignty"[20] problem by *deeming* personal jurisdiction present (and sovereignty thereby validly asserted).[21] Further, deeming personal jurisdiction present would not be an effective sanction in these cases, and restricting trial courts to that sanction would entirely defeat the general deterrence function of discovery sanctions,[22] for a defendant who has reason to believe that discovery would reveal suffi-

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19 The discussion below is plainly not restricted to "this particular case", as respondents' opposition brief asserts, p. 9. The Fifth Circuit did not reach the issue of whether default judgment was an abuse of the trial court's discretion in the choice of discovery sanctions. See Petition for Certiorari, pp. 2a, 6a, 629 F.2d at 1136, 1137-38.

20 Petition for Certiorari, p. 11a, 629 F.2d at 1139.

21 The discovery sanction of ordering that particular facts be deemed established is often tantamount to default judgment, and courts are not required to indulge in a formalistic two-step procedure when one step would achieve the same result. See 4A Moore's Federal Practice ¶ 37.03 [2.-3], p. 37-68, ¶ 37.03 [2.-5], pp. 37-83—37-84.

22 The importance of the most severe discovery sanctions to penalize defendant and to deter those who might be tempted to discovery recalcitrance was emphasized in the *National Hockey League* lines of cases, see Petition for Certiorari, pp. 21-22. For very recent expressions of that policy, see Liew v. Breen, 640 F.2d 1046, 1050 (9th Cir. 1981); Chism v. National Heritage Life Ins. Co., 637 F.2d 1328, 1330-32 (9th Cir. 1981); Phillips v. Insurance Co. of N. America, 633 F.2d 1165, 1167-68 (5th Cir. 1981).

cient United States contacts would have every reason to resist discovery, since the worst sanction that could issue would leave defendant in exactly the same situation that would result from his meeting his discovery obligations. For such a defendant, there would be absolutely no reason not to chance the consequences of discovery recalcitrance.

* * *

The decision below is also inconsistent with *English v. 21st Phoenix Corp.*, 590 F.2d 723 (8th Cir. 1979), *cert. den.*, 444 U.S. 832 (1979), in which the Court *deemed* personal jurisdiction established as a sanction for defendants' refusal to submit to jurisdiction discovery. Defendants' principal attack on the ensuing summary judgment of liability was that "[discovery] sanctions cannot be used to establish jurisdictional facts," 590 F.2d at 727. The Court termed that argument "meritless," pointing out that "[u]nlike subject matter jurisdiction, in personam jurisdiction may be obtained by actions of a party amounting to a waiver, and a court has jurisdiction to enter an order finding a waiver. [citations] The same principles give jurisdiction to the District Court to enter a sanction order. It is established beyond cavil that a court has jurisdiction to determine jurisdiction, and a party cannot hope to avoid the jurisdiction of a court by concealing evidence . . . ." 590 F.2d at 728 n. 5.

The *English* reasoning is fully apposite to the present case, and is not distinguishable on the basis suggested by respondents, opposition brief, p. 9. When the pres-

ent defendants filed their Rule 12(b) motions, they incurred the obligation of furnishing all pertinent jurisdictional information, see *Lekkas, supra;* when they refused to supply that information, defendants waived their objections to personal jurisdiction, see *English, supra.* Any other result is untenable; plaintiffs' discovery rights and the district court's own processes cannot be sacrificed in order to secure an advantage to defendants who abuse discovery, see *Blanco, supra.*

IV. The Court Below Erred In Holding That The U.S. Constitution Demands Compliance With State-Law Jurisdictional Requirements In This Admiralty Case.

The decision below was not based upon statutory grounds or limitations in the Federal Rules of Civil Procedure; the sole basis was the Court's view of "the limitations of sovereignty under due process,"[23] and it was *Texas* sovereignty that received analysis. Thus, much of the discussion in respondent's opposition brief, pp. 10-14, is unresponsive. The cases relied upon at pp. 14-21 of the Petition for Certiorari,[24] indicate at the least that, while the issue of the personal jurisdiction principles applicable to alien defendants in federal question and admiralty cases is the subject of present debate and uncertainty, there is clearly no *constitutional* impediment to considering such a defendant's contacts with

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23 Petition for Certiorari, p. 11a, 629 F.2d at 1139.

24 See also Pain v. United Technologies Corp., 637 F.2d 775, 780 (D.C. Cir. 1980), suggesting that the appropriate personal jurisdiction test is contacts with the United States.

the entire United States in declining a challenge to personal jurisdiction.

Plaintiffs therefore contend that the Court below erred in *assuming* that state-law and 14th Amendment jurisdictional principles controlled the issue of an admiralty court's power to enforce its discovery orders.

* * *

Respondent's opposition brief is seriously mistaken in implying that venue was an issue in the court below, p. 14, and in stating that the court below "found that the Southern District of Texas was not the appropriate forum," p. 19. Venue was not an issue. However, it should be pointed out that any legitimate concern that an alien defendant with United States contacts may lack sufficient contacts with the forum *state* is answered by the liberal availability of venue transfer under 28 U.S.C. §1404(a) and of the forum non conveniens doctrine. See *Alcoa Steamship Company, Inc. v. M/V Nordic Regent*, 636 F.2d 860, 866-67 (9th Cir. 1980) (en banc), pointing out that these doctrines had their earliest development in admiralty cases, precisely because of admiralty's liberal venue and personal jurisdictional principles. If the Southern District of Texas were indeed not the proper forum, there is ample power of that court to order the case transferred or to dismiss it on forum non conveniens grounds.[25] But those doctrines

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25 It is pertinent that a federal court lacking personal jurisdiction over the defendant nevertheless has the power to order the case transferred to a district where personal jurisdiction can be established. Goldlawr, Inc. v. Heiman, 369 U.S. 463, 466-67 (1962); Driscoll v. New Orleans Steamboat Co., 633 F.2d 1158, 1159 (5th Cir. 1981); Wright & Miller, Federal Practice and Procedure, §3827, p. 171.

cannot be sensibly tested when defendant refuses to comply with jurisdiction discovery.

V. Conclusion

Plaintiffs/petitioners reiterate all of the arguments of the Petition for Certiorari and point out that the foregoing rejoinder to respondents' brief opposing certiorari has been severely curtailed by page limitations.

Respectfully submitted,

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CERTIFICATE

I hereby certify, pursuant to United States Supreme Court Rule 28.3, that all counsel of record herein have been served with three copies each of this Petition by depositing same in the United States Mail, first class postage prepaid, properly addressed to counsel at his post office address.